No. 17-3663

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Terry Martin; Linda Russel, aka Linda Russell; Nancy Smith; Deborah Needham,

Plaintiffs-Appellees,

v.

Behr Dayton Thermal Products LLC; Behr America, Inc.; Chrysler Motors LLC, nka Old Carco LLC; Aramark Uniform & Career Apparal Inc.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio, Case No. 3:08-cv-326-WHR-MJN
Honorable Walter H. Rice, District Judge Presiding

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

Edward A. Cohen
Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
ecohen@thompsoncoburn.com

Patrick Morales-Doyle
Thompson Coburn LLP
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
(312) 580-5041
pmoralesdoyle@thompsoncoburn.com

Attorneys for Appellant Old Carco LLC, formerly known as Chrysler LLC (nominal Defendant below)

Nicholas B. Gorga
Khalilah V. Spencer
Honigman Miller Schwartz and Cohn LLP
2290 First National Building
660 Woodward Avenue
Detroit, Michigan 48226-3506
(313) 465-7640
ngorga@honigman.com
kspencer@honigman.com

Attorneys for Appellants Behr Dayton Thermal Products, LLC and Behr America, Inc. (Defendants below)

Michael D. Lichtenstein
Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 07068
(973) 597-2408
mlichtenstein@lowenstein.com

Attorneys for Appellant Aramark Uniform & Career Apparel, LLC (Defendant below)

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STATEMENT IN SUPPORT OF REHEARING EN BANC

This case presents an extraordinarily important question of class action law that has divided the circuits. The merits panel held that district courts may certify "issues" for class action *trials* under Rule 23(c)(4), even when a cause of action as a whole fails Rule 23(b)(3)'s requirement that common issues predominate over individual issues. Based on that erroneous reading of Rule 23, the panel upheld the district court's certification of *seven* issue classes—none of which resolve liability—despite the district court's finding that Plaintiffs' proposed liability-only classes failed Rule 23(b)(3)'s predominance requirement because "[h]ighly individualized issues concerning fact-of-injury and causation overwhelm the few questions that are common to the class."

The panel then compounded its error in adopting the "broad view" of issue class certification by abandoning well-established United States Supreme Court and Sixth Circuit precedent requiring that a district court rigorously analyze each relevant Rule 23 requirement before certifying a class. The Supreme Court has "emphasized" that "certification is proper only if the trial court is satisfied, *after a rigorous analysis*," that each Rule 23 prerequisite has been met, which includes Rule 23(b)(3)'s requirements of predominance of common issues and superiority of class action procedures. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks omitted and emphasis added); *see also Wal-Mart Stores,*

Inc. v. Dukes, 564 U.S. 338, 350-51 (2011); *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011) (reversing certification because a "rigorous analysis" was not conducted). Here, the district court's only analysis of predominance concluded with a finding that common questions *did not* predominate and it never analyzed superiority at all.

In an order granting Defendants' request to appeal the certification decision, a previous panel recognized that this appeal "involves novel issues of first impression" that are "relevant to class litigation in general," and found Defendants had "established a likelihood of success" on appeal. *In re Behr Dayton Thermal Prods., LLC*, Nos. 17-0304/17-0305, slip op. at 2 (6th Cir. June 22, 2017). The merits panel wrongly decided these important issues.

The panel's decision effectively writes predominance and superiority out of Rule 23—in conflict even with courts that follow the broad view—and makes this Circuit an outlier on issue certification. Specifically, by adopting the broad view while discarding the concomitant safeguard of requiring rigorous predominance and superiority analyses by the district court, the panel has opened the virtual class action floodgates, as it is easy to identify a single common issue in nearly any case. For these reasons, and pursuant to Federal Rule of Appellate Procedure 35 and Sixth Circuit Rule 35, Defendants respectfully request that this Court rehear this appeal en banc.

BACKGROUND

Plaintiffs' class certification motion focused almost exclusively upon a request that two liability-only classes be certified under Rule 23(b)(3). (Plaintiffs' Memorandum in Support of their Amended Renewed Motion for Class Certification, RE 254-1, Page ID ## 7361-408.) Their alternative request to certify Rule 23(c)(4) classes on seven liability sub-issues was less than two pages, did not address predominance *within* those issues at all, and merely asserted summarily that "it would be much more efficient" to resolve these issues "on a class-wide basis." (*Id.* at 7404-06.)

The district court denied certification of the liability-only classes because common questions lacked predominance even within the proposed liability-only classes. (Class Certification Decision, RE 274, Page ID ## 9723-49.) In addressing the Rule 23(b)(3) requirements, the court concluded "that Plaintiffs have failed to satisfy the predominance requirement" because "[h]ighly individualized issues concerning fact-of-injury and causation overwhelm the few questions that are common to the class." (*Id.* at 9749.) Because Plaintiffs could not satisfy predominance, the court found it unnecessary to analyze superiority and expressly declined to do so. (*Id.*)

The district court then turned to Plaintiffs' alternative request for issues certification under Rule 23(c)(4). The court explicitly certified issues classes *in*

spite of a lack of predominance, stating baldly that the seven listed issues were "suitable for class treatment" under Rule 23(c)(4) "even though Plaintiffs *have failed to satisfy the predominance requirement* of Rule 23(b)(3)." (*Id.* at 9753 (emphasis added).) The court also failed to address superiority in its Rule 23(c)(4) discussion. (*Id.* at 9749-56.)

Both sides sought interlocutory review under Rule 23(f). Finding Defendants were likely to succeed in appealing the "novel issues" raised by the district court's order, this Court granted Defendants' petition and denied Plaintiffs' cross-petition. *See Behr*, Nos. 17-0304/17-0305, slip op. at 2-3, attached hereto as Exhibit 1.

In their merits briefs, Defendants argued that, if the panel reached the circuit split regarding when issue classes are permissible, it should adopt the "narrow view" espoused by the Fifth Circuit rather than the "broad view" adopted by the Ninth and Second Circuits, because the Fifth Circuit's views are more consistent with the structure of Rule 23 and the purpose of the predominance and superiority requirements. The panel, however, concluded that the broad view was "the proper reading of Rule 23." *See Martin v. Behr Dayton Thermal Prods. LLC*, No. 17-3663, ___ F.3d ____, 2018 WL 3421711, slip op. at 9-10 (6th Cir. July 16, 2018), attached hereto as Exhibit 2.

Moving on to the application of subdivision (c)(4), the panel described the district court's analysis as failing to "include a robust application of predominance

and superiority to the issues it certified for class treatment." *Id.* at 10. Yet the *panel* stated that common issues predominated within each of the seven issues certified despite "[t]he district court's determination that individualized inquiries predominate over the elements of actual injury and causation." *Id.* at 11. Acknowledging that the district court did "not explicitly engag[e] in a superiority analysis," the panel chose to conduct one in the first instance. *Id.* at 14. However, rather than conducting a *rigorous analysis*, the panel summarily concluded that a class-action trial would "go a long way toward" resolving liability and would be "the most efficient way of resolving" the certified issues even as it admitted that answering the certified issues "'will not resolve the question of Defendants' liability either to the class as a whole or to any individual therein.'" *Id.* at 13-14.

ARGUMENT

I. The panel chose the wrong side of a circuit split on a critically important issue of class action law.

The circuits are divided on how to interpret Rule 23(c)(4), which states that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues," in light of Rule 23(b)(3)'s predominance and superiority requirements. The Fifth Circuit has correctly held that these rules together allow for class trials on particular issues only when common questions predominate over individual questions within the cause of action as a whole. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *see also*

Allison v. Citgo Petroleum Corp, 151 F.3d 402, 421-22 (5th Cir. 1998) (holding that "an attempt to 'manufacture predominance through the nimble use of subdivision (c)(4)' is precisely what *Castano* forbade"). Under this so-called narrow view, Plaintiffs' issue classes could never have been certified in this case because the district court found that common questions did not predominate over individualized questions even when limited only to the issue of liability.

The panel rejected the Fifth Circuit's standard and *claimed* to adopt the "broad view" of the Ninth and Second Circuits, which permits class trials on limited issues if common questions predominate over individual questions *within the specific issues to be certified*. *See In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996).

In fact, the panel's approach embraced an even more liberal reading of Rule 23(c)(4) because it approved a set of seven, narrow issues classes *within* the issue of liability. Equally important, the panel's decision effectively reads Rule 23(b)(3)'s predominance and superiority requirements out of Rule 23, by disregarding controlling precedent requiring rigorous analysis of Rule 23(b)(3)'s factors *before* district courts may grant certification in class actions. Accordingly, the panel has established a rule in this Circuit that allows for much more far-reaching issue class certification than the other circuits that have adopted the

"broad view," allowing for an issue class to be certified whenever even a *single* common issue can be found.

A. The panel's adoption of the broad view effectively repeals Rule 23(b)(3)'s predominance requirement.

The panel erroneously jettisoned Rule 23(b)(3)'s requirements in making it easier for plaintiffs to obtain class certification. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 569 U.S. at 33 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Accordingly, "[t]o come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Id.* (quoting *Wal-Mart*, 564 U.S. at 350).

Rule 23(b) provides for three different types of class actions. The third type, under subdivision (b)(3), allows for certification if—in addition to meeting Rule 23(a)'s requirements—"the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, *and* that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). This provision was "an 'adventuresome innovation' of the 1966 amendments" to Rule 23, and was created "for situations 'in which "class-action treatment is not as clearly called for",'" as compared to subdivisions (b)(1) and (2). *Wal-Mart*, 564 U.S. at 362 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 614-15 (1997)). By "adding 'predominance' and 'superiority' to the qualification-for-certification list," the framers sought to provide an avenue to achieve efficiencies through class action "without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment). From its inception, subdivision (b)(3) was understood to "invite[] a close look at the case before it is accepted as a class action." *Id.* (citation omitted).

Situated among other procedural provisions in subdivision (c), this Court has recognized Rule 23(c)(4) as a procedural mechanism that can be used, for example, to certify a liability-only class and "reserve[] all issues concerning damages for individual determination." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013). The Advisory Committee notes on subdivision (c)(4) provide the same example as an appropriate use of the provision: certification on the issue of "liability to the class." Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

The narrow view, under which the party seeking certification must show predominance of common questions across the cause of action as a whole before certifying an issue class, is consistent with the advisory committee notes and is the only suitable way to read subdivision (c)(4) in light of Rule 23 and the Supreme Court's class action jurisprudence. "The proper interpretation of the interaction

between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano*, 84 F.3d at 745 n.21. By contrast, the broad view improperly allows courts to "manufacture predominance through the nimble use of subdivision (c)(4)." *Id.* Such a reading is incongruous with the fact that Rule 23(b)(3) itself was an "adventuresome innovation" that allows for class certification in more borderline cases only after a "close look" and demonstration of predominance and superiority. *See Amchem*, 521 U.S. at 614-15. Requiring predominance only *within* the issues to be certified upends the delicate balance between efficiencies and procedural fairness that the predominance requirement was designed to achieve. *See id.* As *Castano* warned, reading Rule 23(c)(4) "as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement" and would result in "automatic certification in every case where there is a common issue." 84 F.3d at 745 n.21.

The panel's decision is a manifestation of exactly what *Castano* warned against. The district court analyzed predominance not even across a whole cause of action, but *limited to the issue of liability*, and found common questions were "overwhelm[ed]" by individualized questions. (Class Certification Decision, RE 274, Page ID # 9749.) Yet, through nimble use of subdivision (c)(4) under the

broad view, the panel concluded the predominance requirement *was* met because "individualized inquiries" do not "outweigh the common questions prevalent *within each issue*." *Martin*, slip op. at 11. The predominance requirement is eviscerated when a construction of subdivision (c)(4) allows for issue certification *despite* the district court having concluded that individualized questions predominate even in a liability-only class. It sacrifices procedural fairness without even achieving the desired efficiencies because it certifies issues that are "not 'carve[d] at the joint,'" creating a distinct likelihood that issues decided at the class-action trial "would necessarily be reexamined" by different factfinders at subsequent, individual trials. *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 313 (N.D. Ohio 2007) (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995)).

Each of the panel's three justifications for adopting the broad view is unpersuasive. *See Martin*, slip op. at 9. First, the narrow view does not render subdivision (c)(4) superfluous. Rather, it appropriately leaves subdivision (c)(4) to be used, for example, to certify a liability-only class in cases where "liability questions common to the class predominate over damages questions unique to class members," as this Court did in *Whirlpool*. 722 F.3d at 861 (quoting *Comcast*, 569 U.S. at 43). Second, the broad view does not "flow[] naturally from Rule 23's text." *Martin*, slip op. at 9. Contrary to the panel's suggestion, the phrase "[w]hen

appropriate" does not favor either view of the rule. Likewise, the Advisory Committee report cited by the panel does not endorse *either* the narrow or the broad view, it simply reflects a decision not to amend subdivision (c)(4). Furthermore, the broad view disregards the structure of Rule 23 and the fact that the issues-class provision comes not as a fourth type of class action under subdivision (b), but among other merely *procedural* provisions in subdivision (c). Finally, the panel's claim that the superiority requirement will act as a "backstop" against misuse of subdivision (c)(4) completely disregards subdivision (b)(3)'s language, which requires predominance *and* superiority. Fed. R. Civ. P. 23(b)(3). A construction of subdivision (c)(4) that diminishes predominance based on the purported "backstop" of the superiority requirement conflicts directly with and ignores a "court's duty to take a '"close look"' at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (quoting *Amchem*, 521 U.S. at 615).

B. The panel's decision conflicts with controlling precedent requiring that district courts rigorously analyze each Rule 23 requirement.

In applying its broad reading of Rule 23(c)(4), the panel compounded its error by departing from longstanding precedent requiring *district courts* to conduct "rigorous analysis" of Rule 23's requirements before certification. The requirement that no class be certified until the district court has rigorously analyzed each

relevant Rule 23 requirement and determined that the movant has proven their satisfaction is a longstanding, bedrock principle of class action jurisprudence. *See, e.g.*, *Wal-Mart*, 564 U.S. at 350-51; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). "Repeatedly, [the Supreme Court has] emphasized . . . that certification is proper only if *the trial court* is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Comcast*, 569 U.S. at 33 (emphasis added and internal quotation marks omitted). "The *same analytical principles govern Rule 23(b)*. If anything, Rule 23(b)(3)'s predominance criterion is *even more demanding* than Rule 23(a)." *Id.* at 34 (emphasis added). Longstanding Sixth Circuit precedent likewise requires rigorous analysis of predominance and superiority. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996).

The rigorous analysis requirement helps ensure that the party seeking certification meets its burden to *prove* each Rule 23 requirement is satisfied. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ____, 134 S. Ct. 2398, 2420 (2014). The Supreme Court's recent class action cases "have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement." *Id.* at 2412; *see also Wal-Mart*, 564 U.S. at 350-51.

As this Court has emphasized, "[t]he 'rigorous analysis' requirement is critical because it ensures that each of the prerequisites for certification have actually been satisfied." *Pipefitters*, 654 F.3d at 629. "Given the huge amount of judicial resources expended by class actions, particular care in their issuance is required." *Id.* at 630. "Hence the need for a 'rigorous analysis' *by the district court* as to *all the requirements* of Rule 23. The absence of analysis by the district court . . . result[s] in reversible error." *Id.* (emphasis added); *see also, e.g.*, *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 554-57 (5th Cir. 2011) (reversing class certification because Rule 23 required "a far more rigorous analysis" on predominance "than the district court conducted").

The panel decision simply discarded this requirement. The panel acknowledged that the district court's certification order "did not include a *robust application* of predominance and superiority to the issues it certified for class treatment." *Martin*, slip op. at 10 (emphasis added). That is quite an understatement. The district court *never* conducted any predominance analysis within the issues that it certified for class treatment, as the broad view requires. *Id.* at 11. The only predominance analysis in the district court's order unambiguously states that common questions *do not predominate* over individualized questions five separate times. (Class Certification Decision, RE 274, Page ID # 9739, 9749, 9753, 9756.)

Likewise, the district court conducted no analysis and made no finding of superiority whatsoever. The district court explicitly declined to analyze superiority in its Rule 23(b)(3) discussion and never revisited it when addressing Plaintiffs' alternative Rule 23(c)(4) issue class argument. (*Id.* at 9749.)

The panel's decision to affirm notwithstanding the district court's lack of any relevant predominance or superiority findings demonstrates the panel's departure from settled Rule 23 principles. Compliance with Rule 23 requires actual written analysis of the circumstances of the case, not "mere repetition of the rule's language." *Pipefitters*, 654 F.3d at 629. An "absence of analysis" on a Rule 23 requirement is "reversible error." *Id.* at 630. As the Eighth Circuit recently noted, "at a minimum," a "rigorous analysis" on class certification "requires a district court to *state its reasons for certification in terms specific enough for meaningful appellate review*." *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017) (emphasis added), *amended*, 855 F.3d 913. Because of the rigorous analysis requirement, class certification decisions have been specifically distinguished from situations where an appellate court may affirm for any reason apparent from the record. *Keil v. Lopez*, 862 F.3d 685, 694 (8th Cir. 2017).

The panel improperly attempted to perform this analysis in the first instance. But the panel's brief discussion of the commonality of the certified issues clearly would be insufficient to satisfy the rigorous analysis requirement if it were found

in a district court order. *Martin*, slip op. at 11. For example, the panel never even addressed Plaintiffs' causes of action, while the Supreme Court has stated that "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Likewise, on superiority, the panel gave no consideration whatsoever to the practicalities of how these seven certified issues will be tried or how the rest of the case will proceed if Plaintiffs prevail on some or all of those issues. *Martin*, slip op. at 13-14; *see Madison*, 637 F.3d at 556-57 (reversing for failure to consider how a class trial would be administered).

Given the connection between the rigorous analysis requirement and the movant's burden of proof, the panel's abandonment of the requirement led it to improperly shift the burden to Defendants to show a *lack* of predominance and superiority. The panel blamed *Defendants* for not having proven that common questions do not predominate over individualized questions "*within each issue*" and for not presenting and not specifically agreeing to adjudication procedures alternative to a class action. *Martin*, slip op. at 11, 13.

This burden shifting directly conflicts with controlling precedent. It is the "party seeking to maintain a class action" that has the burden to "affirmatively demonstrate" compliance with Rule 23, which requires satisfaction "through

evidentiary proof [of] at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33. This Court has chided district courts for such burden shifting. *See Am. Med.*, 75 F.3d at 1086 (finding court erred by requiring defendants "to 'show cause why [the court] shouldn't certify a class'" because "the burden of establishing the elements of a class action rests on the party seeking certification"). The panel's clear frustration with the fact that this case is ten years old, *see Martin*, slip op. at 13, 15, is no reason to abandon the rigorous analysis rule. If anything, the fact that it has taken a decade for this complex case to proceed only through the *certification* phase demonstrates that it is ill-suited for class litigation and that proceeding with issues classes—which will indisputably resolve neither liability nor damages for any Plaintiff—will not result in efficiencies, but instead further delay resolution of Plaintiffs' claims.

Ironically, in *Valentino*, one of the very cases the panel followed to adopt the broad view, the Ninth Circuit *reversed* the district court's issues-class certification because the court did not rigorously analyze predominance and superiority. 97 F.3d at 1234-35. Notably, in doing so, the Ninth Circuit followed this Court's *American Medical* decision, reversing a certification based on the district court's failure to conduct a rigorous analysis. *Id.* at 1235 (citing *Am. Med.*, 75 F.3d at 1080-86).

II. The panel's decision will have enormous practical consequences.

The real-world effect of the panel's decision will be to allow issue class certification far too easily. In virtually any case in this Circuit, plaintiffs will be able to identify *some* common issue that can be tried classwide, even if resolution of that issue does little or nothing to advance the conclusion of the litigation. This will encourage more filings of marginal class claims that (even though they could not be certified as a whole) impose enormous litigation costs on defendants and the federal courts. In sum, the panel's decision dramatically alters the delicate balance that Rule 23 strikes, to the detriment of plaintiffs, defendants, and the courts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant this petition, rehear this appeal en banc, allow the parties to submit supplemental briefs, and reverse the district court's class certification order.

Respectfully submitted,

/s/ Edward A. Cohen

Edward A. Cohen
Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
ecohen@thompsoncoburn.com

Patrick Morales-Doyle
Thompson Coburn LLP
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
(312) 580-5041
pmoralesdoyle@thompsoncoburn.com

Attorneys for Appellant Old Carco LLC, formerly known as Chrysler LLC (nominal Defendant below)

/s/ Nicholas B. Gorga
(with permission)
Nicholas B. Gorga
Khalilah V. Spencer
Honigman Miller Schwartz and Cohn LLP
2290 First National Building
660 Woodward Avenue
Detroit, Michigan 48226-3506
(313) 465-7640
ngorga@honigman.com
kspencer@honigman.com

Attorneys for Appellants Behr Dayton Thermal Products, LLC and Behr America, Inc. (Defendants below)

/s/ Michael D. Lichtenstein
(with permission)
Michael D. Lichtenstein
Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 07068
(973) 597-2408
mlichtenstein@lowenstein.com

Attorneys for Appellant Aramark Uniform & Career Apparel, LLC (Defendant below)

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,870 words, as calculated by Microsoft Word, the word-processing program used to prepare this document.

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Dated: July 30, 2018

/s/ Edward A. Cohen

One of the Attorneys for Appellant Old Carco LLC, formerly known as Chrysler LLC (nominal Defendant below)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants-Appellants' Petition for Rehearing En Banc was served upon the following via the Court's CM/ECF system, this 30th day of July, 2018:

Douglas D. Brannon
Brannon & Associates
130 West Second Street, Suite 900
Dayton, Ohio 45402
dougbrannon@branlaw.com

Attorney for Plaintiffs-Appellees

Ned Miltenberg
National Legal Scholars Law Firm, P.C.
5410 Mohican Road, Suite 200
Bethesda, MD 20816-2162
Ned_Miltenberg@gmail.com

Attorney for Plaintiffs-Appellees

Patrick A. Thronson
Janet, Jenner & Suggs, LLC
4 Reservoir Circle, Suite 200
Baltimore, MD 21208
pthronson@jjsjustice.com

Attorney for Plaintiffs-Appellees

Dated: July 30, 2018

/s/ Edward A. Cohen

One of the Attorneys for Appellant Old Carco LLC, formerly known as Chrysler LLC (nominal Defendant below)

EXHIBIT 1

Nos. 17-0304/0305

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 22, 2017
DEBORAH S. HUNT, Clerk

In re: BEHR DAYTON THERMAL PRODUCTS, LLC, et al.,

Petitioners (No. 17-0304),

and

In re: TERRY MARTIN, et al.,

Petitioners (No. 17-0305).

O R D E R

Before: SILER and BATCHELDER, Circuit Judges; BERTELSMAN, District Judge.*

In this toxic-tort action, the district court denied certification of a class action under Federal Rule of Civil Procedure 23(b)(3)—requiring that common issues of law and fact predominate over individual issues—and certified a class action under Federal Rule of Civil Procedure 23(c)(4)—permitting maintenance of a class action on particular issues. In No. 17-0304, Defendants Behr Dayton Thermal Products, Behr America, Chrysler Motors, and Aramark Uniform and Career Apparel petition for permission to appeal the Rule 23(c)(4) portion of the district court's order. *See* Fed. R. Civ. P. 23(f). In No. 17-0305, Plaintiffs cross-petition for permission to appeal the Rule 23(b)(3) portion of the order, *see id.*, and separately move to add cross-petitioners. Defendants oppose the cross-petition.

We may, in our discretion, permit an appeal from an order granting or denying class certification. Fed. R. Civ. P. 23(f). This "unfettered" discretion is akin to the discretion of the

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Supreme Court in considering whether to grant *certiorari*; thus, we may consider any relevant factor we find persuasive. *See* Fed. R. Civ. P. 23, advisory committee's note (1998); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002). Factors that we consider include: (1) whether the petitioner is likely to succeed on appeal under a deferential abuse-of-discretion standard; (2) whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered; (3) whether the case presents a novel or unsettled question of law; and (4) the procedural posture of the case before the district court. *In re Delta Air Lines*, 310 F.3d at 960.

Provided that the court applied the correct framework for evaluating a class-action claim, we review the denial of certification for an abuse of discretion. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). The novelty of a claim "weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before us, but also to class litigation in general." *In re Delta Air Lines*, 310 F.3d at 960.

In No. 17-0304, Defendants petition for permission to appeal the district court's Rule 23(c)(4) certification, arguing that: (1) the decision contravenes all current authority on predominance; (2) the district court abused its discretion by certifying a Rule 23(c)(4) class action without addressing superiority; and (3) the certification violates fundamental constitutional principles and the Rules Enabling Act. Defendants have established a likelihood of success, their petition involves novel issues of first impression, and a ruling on these issues would be relevant to class litigation in general. The procedural posture of the case also weighs in favor of appeal because Plaintiffs do not oppose the petition and our ruling could materially advance the termination of the litigation below.

In No. 17-0305, Plaintiffs summarily cross-petition for permission to appeal, with few citations to authority and no analysis of how that authority favors review. The district court outlined elements of Plaintiffs' liability case that were subject to individualized proof. That

there are other issues subject to common proof does not, standing alone, establish predominance or that the district court abused its discretion in denying certification on this basis. Also, critically, Plaintiffs have not shown that application of the law to these facts is an issue relevant to class litigation in general or addressed any of the other relevant factors supporting review.

The petition for permission to appeal in No. 17-0304 is **GRANTED**. The cross-petition for permission to appeal in No. 17-0305 is **DENIED** and the motion to add petitioners in No. 17-0305 is **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT 2

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0139p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERRY MARTIN; LINDA RUSSEL, aka Linda Russell; NANCY SMITH; DEBORAH NEEDHAM,

Plaintiffs-Appellees,

v.

BEHR DAYTON THERMAL PRODUCTS LLC; BEHR AMERICA, INC.; CHRYSLER MOTORS LLC, nka Old Carco LLC; ARAMARK UNIFORM & CAREER APPAREL INC.,

Defendants-Appellants.

No. 17-3663

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 3:08-cv-00326—Walter H. Rice, District Judge.

Argued: March 8, 2018

Decided and Filed: July 16, 2018

Before: GILMAN, ROGERS, and STRANCH, Circuit Judges

COUNSEL

ARGUED: Edward A. Cohen, THOMPSON COBURN, LLP, St. Louis, Missouri, for Appellants. Ned Miltenberg, NATIONAL LEGAL SCHOLARS LAW FIRM, P.C., Bethesda, Maryland, for Appellees. **ON BRIEF:** Edward A. Cohen, THOMPSON COBURN, LLP, St. Louis, Missouri, Patrick Morales-Doyle, THOMPSON COBURN LLP, Chicago, Illinois, Nicholas B. Gorga, Khalilah V. Spencer, HONIGMAN MILLER SCHWARTZ AND COHN LLP, Detroit, Michigan, Michael D. Lichtenstein, Nikki Adame Winningham, LOWENSTEIN SANDLER LLP, Roseland, New Jersey, for Appellants. Ned Miltenberg, NATIONAL LEGAL SCHOLARS LAW FIRM, P.C., Bethesda, Maryland, Patrick A. Thronson, JANET, JENNER & SUGGS, LLC, Baltimore, Maryland, Douglas D. Brannon, BRANNON & ASSOCIATES, Dayton, Ohio, for Appellees.

OPINION

JANE B. STRANCH, Circuit Judge. This toxic tort class action case arises from Defendants' alleged contamination of the groundwater in the McCook Field neighborhood of Dayton, Ohio. Plaintiffs own properties in McCook Field, which is a low-income area surrounding a Superfund site. They allege that Defendants released volatile organic compounds and other hazardous substances into the groundwater underlying their properties and were deliberately indifferent to the resultant harm. The district court denied Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23(b)(3), but certified seven issues for class treatment under Rule 23(c)(4). Defendants filed a Rule 23(f) petition to appeal the district court's issue-class certification order, and this court granted review. For the following reasons, we **AFFIRM** the district court's certification decision.

I. BACKGROUND

A. Factual Background

In 2008, thirty named plaintiffs filed this class action case, which now encompasses 540 properties in the McCook Field neighborhood. Defendants are four entities incorporated in Delaware and authorized to do business in Ohio: Behr Dayton Thermal Products LLC; Behr America, Inc.; Chrysler Motors LLC; and Aramark Uniform & Career Apparel, Inc.[1]

Plaintiffs allege that the groundwater beneath their properties is contaminated with a number of known and suspected carcinogenic volatile organic compounds (VOCs). They contend that Defendants Chrysler and Aramark released these chemicals into the environment over a period of many years while they operated their respective automotive and dry cleaning

[1]Plaintiffs initially named several additional entities as defendants, but they have since dismissed their claims against those parties.

facilities.[2] The toxic chemicals seeped from the commercial properties into the groundwater in two separate plumes, which converge south of Aramark's facility.

The Chrysler-Behr Plume encompasses groundwater contamination from the Chrysler-Behr facility. Plaintiffs assert that Defendants Behr and Chrysler have known about the VOC contamination since 2000 but failed to take steps to remediate it or prevent its spread. The United States Environmental Protection Agency (EPA) became involved in 2006, initiated an emergency removal action in 2007, and designated the area as a Superfund site in 2009. According to the EPA, Defendants Behr and Chrysler released trichloroethene (TCE) and other hazardous substances from their facility, which contaminated the groundwater. This contaminated groundwater migrated south to the areas underlying Plaintiffs' properties. In 2006, the EPA conducted testing of the surface overlying the Chrysler-Behr Plume and determined that the "sub-slab" levels of TCE and other VOCs exceeded allowable levels.

The Aramark Plume encompasses groundwater contamination from Aramark's above-ground chemical storage tanks at the facility that the company formerly used for its dry cleaning operations. Aramark used these tanks to store cleaning agents, including tetrachloroethylene (PCE), a VOC. Deposition testimony indicates that Aramark was aware of PCE contamination as early as 1992.

Plaintiffs have access to a municipal water source for drinking, but the contaminated groundwater creates the risk of VOC vapor intrusion in their homes and buildings. Vapor intrusion, in turn, creates the risk that Plaintiffs will inhale carcinogenic and hazardous substances. The EPA described the harm as follows:

> Elevated levels of TCE detected in the indoor air in four homes could harm residents who breathe the indoor air. Potential adverse effects from breathing TCE include immunological effects, fetal heart malformations, kidney toxicity, and an increased risk of developing kidney cancer. Installation of the vapor abatement systems has lowered the concentrations of contaminants to levels that are not expected to result in any adverse health effects. However, installation and operation of the vapor abatement systems are an interim action to mitigate or

[2]Chrysler sold its facility, referred to as the Chrysler-Behr Facility, to Behr in 2002. The Chrysler–Behr facility is located just north of Aramark's facility.

> prevent current exposures and do not fully address the contaminated groundwater plume under the neighborhood and the source of contamination at this site.

Plaintiffs explain that "[a]ll of the properties above the Plumes have and will continue to have a risk of toxic vapor intrusion, and approximately half of the buildings that lie above the plumes currently experience severe vapor intrusion." Vapor intrusion in McCook Field structures has caused real harm: At least one school was closed and demolished when vapor mitigation systems were unable to adequately contain the levels of harmful substances in the air.

B. Procedural History

Plaintiffs originally filed suit in the Court of Common Pleas for Montgomery County, Ohio. Chrysler subsequently removed the action to the United States District Court for the Southern District of Ohio, invoking jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2). The district court consolidated this case with two related actions.

Plaintiffs filed a Master Amended Class Action Complaint in 2015. The operative complaint includes eleven causes of action: (1) trespass; (2) private nuisance; (3) unjust enrichment; (4) strict liability; (5) negligence; (6) negligence per se; (7) battery; (8) intentional fraudulent concealment; (9) constructive fraud; (10) negligent misrepresentation; and (11) civil conspiracy. Plaintiffs sought Rule 23(b)(3) class certification as to liability only for five of their eleven causes of action—private nuisance, negligence, negligence per se, strict liability, and unjust enrichment. In the alternative, they requested Rule 23(c)(4) certification of seven common issues.

The district court determined that although Plaintiffs' proposed classes satisfied Rule 23(a)'s prerequisites, Ohio law regarding injury-in-fact and causation meant that Plaintiffs could not meet Rule 23(b)(3)'s predominance requirement.[3] Accordingly, the district court denied certification of the two proposed liability-only classes. The district court then addressed Plaintiffs' alternate request for issue-class certification under Rule 23(c)(4). It considered whether predominance constitutes a threshold requirement that must be satisfied with respect to

[3]Plaintiffs dispute this understanding of Ohio law and have reserved the right to appeal it on a non-interlocutory basis. Importantly, actual injury in this context does not relate to Article III standing but rather to the element of Ohio tort law.

the entire action before a court may certify certain issues, noting that this question has resulted in a conflict between several other circuits. Finding persuasive the so-called "broad view," the district court rejected treating predominance as a threshold requirement and certified the following seven issues for class treatment:

> Issue 1: Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;
>
> Issue 2: Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;
>
> Issue 3: Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;
>
> Issue 4: Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;
>
> Issue 5: Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;
>
> Issue 6: Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and
>
> Issue 7: Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.

The district court concluded its class certification decision by stating that it would "establish procedures by which the remaining individualized issues concerning fact-of-injury, proximate causation, and extent of damages can be resolved" and noting that any such procedures would comply with the Reexamination Clause of the Seventh Amendment.[4]

Defendants filed a timely Rule 23(f) petition. They argued that the district court reached the wrong conclusion on the interaction between Rules 23(b)(3) and 23(c)(4) and that, even under the broad view, the issue classes do not pass muster. Defendants also raised Seventh Amendment arguments, citing the district court's mention of a potential procedure involving the use of a Special Master to resolve remaining issues. Plaintiffs cross-appealed, arguing that the

[4]Plaintiffs sometimes refer to the district court's certification decision as "conditional." It is true that certification orders may be modified before final judgment, *see* Fed. R. Civ. P. 23(c)(1)(C), but the provision of Rule 23 that provided for conditional certification was removed as part of the 2003 amendments.

district court should have granted their request for Rule 23(b)(3) certification of liability-only classes. A non-oral argument panel of this court granted Defendants' petition and denied Plaintiffs' cross-appeal. *In re Behr Dayton Thermal Prods. LLC*, Nos. 17-0304/17-0305 (6th Cir. June 22, 2017) (order). Our review is therefore limited to the district court's decision to certify issue classes under Rule 23(c)(4).

II. ANALYSIS

A. Jurisdiction

The district court properly exercised jurisdiction under CAFA because the value of the case exceeds $5,000,000, at least one Plaintiff is a citizen of a state different from at least one of the Defendants, and no statutory exceptions apply. *See* 28 U.S.C. § 1332(d)(2). This court has jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f), which together provide for discretionary appellate review of a district court's interlocutory class certification decision.

B. Standard of Review

The standard of review for appeals of class certification decisions is set forth comprehensively in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*:

> A district court has broad discretion to decide whether to certify a class. This court has described its appellate review of a class certification decision as narrow and as very limited. We will reverse the class certification decision in this case only if [the appellant] makes a strong showing that the district court's decision amounted to a clear abuse of discretion. An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment. We will not find an abuse of discretion unless we reach a definite and firm conviction that the district court committed a clear error of judgment.

722 F.3d 838, 850 (6th Cir. 2013) (citations and internal quotation marks omitted). With this standard in mind, we turn to the certification decision in this case.

C. Issue Classes

1. Rule 23(b)(3) and Rule 23(c)(4)

As the district court and the parties point out, other circuits have disagreed about how Rule 23(b)(3)'s requirements interact with Rule 23(c)(4). Rule 23(b)(3) permits class certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

Under what is known as the broad view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The broad view permits utilizing Rule 23(c)(4) even where predominance has not been satisfied for the cause of action as a whole. *See In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (permitting issue certification "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)[] and proceed with class treatment of these particular issues."). In addition to the Second and Ninth Circuits, the Fourth and Seventh Circuits have supported this approach. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) ("Rule 23(c)(4) provides that 'when appropriate, an action may be brought or maintained as a class action with respect to particular issues.' The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted."), *abrogated on other grounds by Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 559 (7th Cir.), *reh'g and suggestion for reh'g en banc denied*, (7th Cir. Aug. 3, 2016); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) ("A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments."); *Gunnells v. Healthplan Servs.*,

Inc., 348 F.3d 417, 439–45 (4th Cir. 2003) (holding that courts may employ Rule 23(c)(4) to certify a class as to one claim even though all of the plaintiffs' claims, taken together, do not satisfy the predominance requirement).

The Fifth Circuit explained in a footnote what is known as "the narrow view," which prohibits issue classing if predominance has not been satisfied for the cause of action as a whole. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."). The narrow view has been referenced with tenuous support by the Eleventh Circuit. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (rejecting a district court's certification of a class of hospitals suing a health maintenance organization for underpayment but nevertheless recognizing "the long and venerated practice of creating subclasses as a device to manage complex class actions"). But *Castano*'s issue-class footnote has not been adopted by any other circuit, and subsequent caselaw from within the Fifth Circuit itself indicates that any potency the narrow view once held there has dwindled. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (noting that bifurcation might serve "as a remedy for the obstacles preventing a finding of predominance" but that the plaintiffs had not made such a proposal to the district court).

Two circuit court decisions have relied on a functional, superiority-like analysis instead of adopting either the broad or the narrow view. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (evaluating issue certification based on the factors set forth in Principles of the Law of Aggregate Litigation §§ 2.02–05 (2010)); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (declining to certify issue classes because they "would do little to increase the efficiency of the litigation").

Our Circuit has not yet squarely addressed the interplay between Rule 23(b)(3) and Rule 23(c)(4), *see Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 356 (6th Cir. 2011) ("The Sixth Circuit has not yet weighed in on this issue and we do not [do so] at this time . . . ."), but

the case at hand requires us to grapple with the two provisions. An evaluation of the broad approach persuades us of its merits.

First, the broad approach respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous. The broad approach retains the predominance factor, but instructs courts to engage in the predominance inquiry *after* identifying issues suitable for class treatment. Accordingly, the broad view does not risk undermining the predominance requirement. By contrast, the narrow view would virtually nullify Rule 23(c)(4). *See Gunnells*, 348 F.3d at 439–40.

Second, the broad view flows naturally from Rule 23's text, which provides for issue classing "[w]hen appropriate." A prior version of Rule 23 even instructed that, after selecting issues for class treatment, the remainder of Rule 23's provisions "shall then be construed and applied accordingly." Although the Rule no longer contains this sequencing directive, the Advisory Committee made clear that the changes to the Rule's language were "stylistic only." Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 2007 amend. The Advisory Committee has also declined to alter the language of Rule 23(c)(4) to reflect the narrow view or otherwise limit the use of issue classes. *See* Advisory Committee on Civil Rules, *Rule 23 Subcommittee Report* 90–91 (2015), http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf (indicating that the broad approach's dominance reflects the proper understanding of the Rule—"[t]he various circuits seem to be in accord about the propriety of such [issue] treatment 'when appropriate,' as Rule 23(c)(4) now says").

Third, the concomitant application of Rule 23(b)(3)'s superiority requirement ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution. Superiority therefore functions as a backstop against inefficient use of Rule 23(c)(4). In this way, the broad view also partakes of the functional approach employed in *Gates*, 655 F.3d at 273, and *St. Jude*, 522 F.3d at 841.

In sum, Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment

of those issues is the superior method of resolution. *See Nassau*, 461 F.3d at 226; Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1966 amend. A requirement that predominance must first be satisfied for the entire cause of action would undercut the purpose of Rule 23(c)(4) and nullify its intended benefits. The broad approach is the proper reading of Rule 23, in light of the goals of that rule.

2. Application

Although the district court adopted the broad approach, its analysis did not include a robust application of predominance and superiority to the issues it certified for class treatment. The record nevertheless confirms that the issue classes satisfy both requirements, and this court may affirm for any reason supported by the record. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003).

a. Predominance

Rule 23(b)(3)'s predominance inquiry asks whether "the questions of law or fact common to class members predominate over any questions affecting only individual members." To evaluate predominance, "[a] court must first *characterize* the issues in the case as common or individual and then *weigh* which predominate." 2 William B. Rubenstein, Alba Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 4:50 (5th ed. 2010). The Supreme Court recently explained how this evaluation works:

> An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (alteration, citations, and internal quotation marks omitted).

Here, the district court certified only issues capable of resolution with generalized, class-wide proof. All seven of these issues are questions that need only be answered once because the answers apply in the same way to each property owner within the plumes. Expert evidence will be central to resolving these seven issues, especially Issues 1, 4, and 5.[5] Such evidence will bear on all of the property owners within each plume in the same way. In addition, Issues 1, 2, 3, 6, and 7 turn on each Defendant's knowledge and conduct, which need only be established once for each plume.[6]

The district court's determination that individualized inquiries predominate over the elements of actual injury and causation does not mean that the same individualized inquiries taint the certified issues. To the contrary, the certified issues do not overlap with actual injury or causation. Issue 6, to be sure, includes the word "caused," but whether Defendants created the risk of vapor intrusion is distinct from the ultimate question of whether they caused an actual injury to property owners. That distinction insulates Issue 6 from overlapping with the liability elements that the district court found incompatible with class treatment.

Nor have Defendants identified any individualized inquiries that outweigh the common questions prevalent *within each issue*. For example, although Defendants have disputed the plume boundaries identified by Plaintiffs' expert, they have not argued that the contamination varies within plumes. At oral argument on appeal, Defendants raised the concepts of temporal and locational variation for the first time. Discussing Issue 7, Defendants asserted that the failure to immediately remediate contamination might constitute negligence with respect to a property directly adjacent to one of the facilities, but not with respect to properties located farther away from the facilities. Given that this case concerns many years of sustained contamination in a contained and relatively small geographic area, this argument carries little weight. Accordingly, "the common, aggregation-enabling, issues in the case are more prevalent or

[5]Issue 1 concerns each Defendant's role in creating the contamination within their respective plumes; Issues 4 and 5 concern whether contamination from the Defendants' facilities underlies their respective plumes.

[6]Issue 1 concerns each Defendant's role in creating the contamination within their respective plumes; Issue 2 concerns foreseeability; Issue 3 concerns whether Defendants engaged in abnormally dangerous activities; Issue 6 concerns the risk of vapor intrusion; and Issue 7 concerns failure to investigate and remediate.

important than the non-common, aggregation-defeating, individual issues." *Tyson*, 136 S. Ct. at 1045 (quoting 2 *Newberg on Class Actions* § 4:45 (5th ed. 2013)).

What is more, *Tyson* instructs that certification may remain "proper" even if "important matters" such as actual injury, causation, and damages will have to be tried separately. *Id.* The Eighth Circuit's decision in *Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016), on which Defendants rely, does not indicate otherwise. There, the court found that the district court's certification of a liability class was an abuse of discretion because "even on the certified issue of liability, there are determinations contained within that analysis that are not suitable for class-wide determination." *Id.* at 479. Specifically, the Eighth Circuit stated:

> Adjudicating claims of liability will require an inquiry into the causal relationship between the actions of General Mills and the resulting alleged vapor contamination. This analysis will include many additional considerations beyond the limited inquiry into General Mills' liability. And, even on the certified issue of liability, there are determinations contained within that analysis that are not suitable for class-wide determination. To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance.

Id. The district court noted that these same problems arise from Ohio's construction of causation and actual injury, and in fact relied on *Ebert* when denying Plaintiffs' request for certification of two liability-only classes under Rule 23(b)(3). But predominance problems within a liability-only class do not automatically translate into predominance problems within an issue class, and Defendants fail to explain why *Ebert* extends to issue-only classes. Accordingly, their invocation of *Ebert*'s broad cautionary language does not map onto the specific certification order at issue here.

Because each issue may be resolved with common proof and because individualized inquiries do not outweigh common questions, the seven issue classes that the district court certified satisfy Rule 23(b)(3)'s predominance requirement.

b. Superiority

Rule 23(b)(3)'s superiority requirement asks whether a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It aims to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23 adv. comm. n. to 1966 amend.). This court's caselaw instructs:

> To determine whether a class action is the superior method for fair and efficient adjudication, the district court should consider the difficulties of managing a class action. The district court should also compare other means of disposing of the suit to determine if a class action is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. Additionally, the court should consider the value of individual damage awards, as small awards weigh in favor of class suits.

Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 630–31 (6th Cir. 2011) (citations and internal quotation marks omitted); *see also In re Whirlpool*, 722 F.3d at 861 ("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery."). Courts also consider the related nonexhaustive factors set forth in Rule 23(b)(3) itself.

Defendants frame all of the Rule 23(b)(3) factors as going to manageability and argue that "[c]ertification would not serve as a superior method for fairly and efficiently adjudicating this controversy because of the numerous, highly individualized inquiries that would be required even after certification." They also contend that some of the issues certified by the district court "can be more easily resolved through the use of discovery devices or stipulations."

Defendants are correct that resolution of the certified issues "will not resolve the question of Defendants' liability either to the class as a whole or to any individual therein." But resolving the certified issues will go a long way toward doing so, and this is the most efficient way of resolving the seven issues that the district court has certified. Defendants' suggestion about discovery devices and stipulations rings hollow given that this case is ten years old and Defendants have yet to agree to such mechanisms.

Although not explicitly engaging in a superiority analysis, the district court correctly noted that issue certification "will ensure that property owners in the McCook Field neighborhood have an opportunity to litigate their claims. By trying these common questions to a single jury, this procedure also saves time and scarce judicial resources." Indeed, the record indicates that the properties are in a low-income neighborhood, meaning that class members might not otherwise be able to pursue their claims. Even if the class members brought suit individually, the seven certified issues would need to be addressed in each of their cases. Resolving the issues in one fell swoop would conserve the resources of both the court and the parties. Class treatment of the seven certified issues will not resolve Defendants' liability entirely, but it will materially advance the litigation. The issue classes therefore satisfy Rule 23(b)(3)'s superiority requirement.

Because the issue classes satisfy predominance and superiority, the district court did not abuse its discretion by certifying them under Rule 23(c)(4).

D. The Seventh Amendment

Defendants have also raised Seventh Amendment arguments, and the order granting their Rule 23(f) petition contemplated interlocutory review of these constitutional concerns. At this time, however, we find no Seventh Amendment issues.

The district court mentioned the possibility of using a Special Master to resolve the individualized issues remaining after the certified issues have been resolved by a jury. Defendants argue that this procedure runs afoul of the Reexamination Clause of the Seventh Amendment, which provides that "no fact tried by a jury[] shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. This constitutional argument incorporates the Rules Enabling Act, which states that procedural rules like Rule 23 "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Plaintiffs respond that the district court was merely hypothesizing about the best procedure and that a properly bifurcated case does not violate the Seventh Amendment.

Plaintiffs have the better of the argument. At this stage, the district court has not formalized any procedures for resolving either the common issues or the remaining

individualized inquiries. The certification decision outlines one option, but the district court may ultimately find that another procedure better facilitates the fair resolution of Plaintiffs' claims. Because the district court has not settled on a specific procedure, no constitutional infirmities exist at this time. Moreover, the fact that the district court preemptively raised the potential for Seventh Amendment concerns suggests that it will take care to conduct any subsequent proceedings in accordance with the Reexamination Clause. And this circuit has confirmed that, "if done properly, bifurcation will not raise any constitutional issues." *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2004). Leading class action treatises agree. *See, e.g.*, 2 *Newberg on Class Actions* § 4:92 (5th ed. 2010). Because the district court has yet to select and implement a procedure for resolving Plaintiffs' claims, no Reexamination Clause problems exist at this time.

III. CONCLUSION

This case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step toward resolving Plaintiffs' claims. Under the broad view, the certification decision did not constitute an abuse of discretion. Nor, at this time, are any Seventh Amendment problems presented. We therefore **AFFIRM** the district court's issue-class certification decision and return this case to the district court with the expectation that it be moved expeditiously toward resolution.